

87-1968

Supreme Court, U.S.

FILED

MAY 28 1988

JOSEPH F. SPANIO, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

DINO BELLO, an individual, and
SIMMONS PARK PROPERTIES, INC.,
a corporation,

Petitioners,

vs.

NORMAN L. WALKER, JOHN E. KANON,
JAMES M. MARTIN, JOSEPH J. URBANOWICZ,
HARRY E. BABINGER, JAMES E. HADSEL,
YVONNE A. RIGATTI, GLENN TRAUTMAN,
WILLIAM W. RUHL, WILLIAM G. DODDS,
PATRICIA M. PRICE, CONCETTA SERDY,
and REID W. MCGIBBENY, individuals,

Respondents.

DINO BELLO, an individual and
SIMMONS PARK PROPERTIES, INC.,
a corporation,

Petitioners,

vs.

MUNICIPALITY OF BETHEL PARK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD L. ROSENZWEIG, ESQUIRE
475 Two Mellon Bank Center
Pittsburgh, Pennsylvania 15219
(412) 281-6504
Attorney for Petitioners

i.

Questions Presented for Review

1. Whether a claim for a temporary taking under the Fifth Amendment is stated when regulation of land use fails to substantially advance legitimate state interests; in particular, is a temporary taking claim stated where an application for building permits is denied because municipal council members, acting in their capacity as officers of the municipality, improperly interfered with the application process for partisan, political or personal reasons unrelated to the merits of the application for permit?

2. Whether the period of time running from an unlawful denial of an application for building permits until a court order's issuance of the permits constitutes a permissible "normal delay" rather than a compensable temporary taking?



TABLE OF CONTENTS.

	Page
Questions Presented for Review	i
Table of Contents	iii
Table of Authorities	iv
Reports of Opinions in the Courts Below	2
Statement of the Grounds for Jurisdiction of this Court.	2
Constitutional Provisions and Statutes Which the Case Involves	2
Statement of the Case	4
Argument Setting Forth the Reasons Relied on for the Allowance of this Writ.	7
Appendix:	
Opinion and Order of the Third Circuit Court of Appeals	1a
Memorandum Orders of the United States District Court for the Western District of Pennsylvania:	
June 4, 1987	16a
July 22, 1987	19a

TABLE OF AUTHORITIES.

Cases.

<i>Agin v. Tiburon</i> , 447 U.S. 255 (1980)	8,9,10,11,13
<i>First English Evangelical Lutheran Church of Glendale v. County of Los Angeles</i> , 107 S.Ct. 2378 (1987)	5,6,13,14,15
<i>Hall v. City of Santa Barbara</i> , 833 F.2d 1270 (9th Cir. 1987)	9
<i>Moore v. East Cleveland</i> , 431 U.S. 494 (1977)	9
<i>Nectow v. Cambridge</i> , 277 U.S. 183 (1928)	9
<i>Nollan v. California Coastal Commission</i> , 177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (1986)	11
<i>Nollan v. California Coastal Commission</i> , 483 U.S. _____, 97 L.Ed.2d 677 (1987)	9,10,11,13
<i>Penn Central Transportation Co. v. New York City</i> , 438 U.S. 104 (1978)	8,9,11,13
<i>Pennell v. San Jose</i> , 99 L.Ed.2d 1 (1988)	10,11,13
<i>Seawall Associates v. City of New York</i> , 523 N.Y.S.2d 353 (Sup. 1987)	11
<i>Wheeler v. City of Pleasant Grove</i> , 664 F.2d 99 (5th Cir. 1981)	12,13

Constitutional Provisions.

Fifth Amendment	2,5,6,7
Fourteenth Amendment, Section 1	3,6

Statutes.

28 U.S.C. §1254(1)	2
28 U.S.C. §2101(c)	2
42 U.S.C. §1983	3,5,6,7

IN THE
Supreme Court of the United States

October Term, 1987

DINO BELLO, an individual, and
SIMMONS PARK PROPERTIES, INC.,
a corporation,

Petitioners,

vs.

NORMAN L. WALKER, JOHN E. KANON,
JAMES M. MARTIN, JOSEPH J. URBANOWICZ,
HARRY E. BABINGER, JAMES E. HADSEL,
YVONNE A. RIGATTI, GLENN TRAUTMAN,
WILLIAM W. RUHL, WILLIAM G. DODDS,
PATRICIA M. PRICE, CONCETTA SERDY,
and REID W. MCGIBBENY, individuals,

Respondents.

DINO BELLO, an individual, and
SIMMONS PARK PROPERTIES, INC.,
a corporation,

Petitioners,

vs.

MUNICIPALITY OF BETHEL PARK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

Petitioners, Dino Bello and Simmons Park Properties, Inc., file the following Petition for Writ of Certiorari to the Supreme Court of the United States.

Reports of Opinions in the Courts Below

The decision of the United States Court of Appeals for the Third Circuit slip opinion of March 1, 1988 is appended to this Petition and is not yet reported. The Memorandum Opinions of the United States District Court for the Western District of Pennsylvania of June 4, 1987 and July 22, 1987 are appended to this Petition and are not reported.

Statement of the Grounds for Jurisdiction of this Court

The date of entry of the Opinion of the United States Court of Appeals for the Third Circuit is March 1, 1988.

The statutory provision believed to confer jurisdiction to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. §1254(1) and §2101(c).

Constitutional Provisions and Statutes Which the Case Involves

The case involves the Fifth Amendment to the United States Constitution which is as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to the twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The case further involves the Fourteenth Amendment, Section 1, to the United States Constitution which is as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The case also involves 42 U.S.C. §1983 which is as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia (R.S. §1979; Dec. 29, 1979, P.L. 96-170, §1, 93 Stat. 1284).

Statement of the Case

Plaintiff Dino Bello is the principal stockholder of Simmons Park Properties, Inc., also a plaintiff in this case. In July of 1976, Bello and Simmons Park applied to the Municipality of Bethel Park for approval of a one lot subdivision and site plan. Although in preliminary discussions with the Municipality the project was divided into five phases, it was ultimately approved as a single lot subdivision to be developed for 254 townhouse dwellings to be sold as condominiums. The property was zoned for R-4 townhouse use and the site plan approval was for the townhouses with no agreement or stipulation to develop in sequential phases.

After completing 47 housing units in the spring of 1979, Bello and Simmons Park applied for permits to commence construction in an area where the roads and sewers had already been completed under the supervision and with the approval of defendants. At this point defendants refused to issue any further building permits, claiming that the project had been approved in five phases and that plaintiffs were now seeking to develop in an area which defendants claimed was phase five rather than in the area which defendants claimed was phase two.

The project came to a halt until defendants were forced by an Order of the Court of Common Pleas of Allegheny County of May 5, 1981 to issue the building permits upon a finding that there was no agreement to develop the project in phases and that the subdivision and site plan approval did not contemplate such phased development. An appeal from that Order by the defendants was quashed for failure to preserve objections.

On September 3, 1980, plaintiffs filed a Complaint under 42 U.S.C. §1983 in the United States District Court for the Western District of Pennsylvania against the individual defendants and on March 11, 1981 filed a separate Complaint against the Municipality of Bethel Park. In an Amended Complaint against the individual defendants, plaintiffs made a claim that they were deprived of vested property rights without just compensation in violation of the Fifth Amendment.

The United States District Court for the Western District of Pennsylvania granted summary judgment on all of plaintiffs' claims by Memorandum Order of June 4, 1987 appended to this Petition, and by Memorandum Order of July 22, 1987 denied a Motion to Vacate the Order of Summary Judgment in light of the Supreme Court case of First English Evangelical Lutheran Church of Glendale, California v. Los Angeles County, 107 Supreme Ct. 2378 (1987).

An appeal was taken to the United States Court of Appeals for the Third Circuit which by Opinion and Order of March 1, 1988 reversed the District Court's Order granting the defendants summary judgment on plaintiffs' claim that they were denied their constitutional right to substantive due process, but affirmed the District Court's dismissal of the remainder of plaintiffs' claims.

The Opinion of the Third Circuit Court of Appeals indicated that the plaintiffs presented evidence from which a fact finder could reasonably conclude that certain council members acting in their capacity as officers of the Municipality improperly interfered with the process by which the Municipality issued building permits, and that they did so for partisan, political or personal reasons unrelated to the merits of the

application for the permits. The Opinion further states that these actions can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation actionable under §1983 (p. 11a of Slip Opinion of the Third Circuit appended hereto).

The Opinion of the Third Circuit acknowledged that plaintiffs had properly raised and preserved the issue as to whether the delay in issuing the building permits constituted an unconstitutional taking of property without just compensation. The Court held that the claim was not waived against the individual defendants and was properly preserved on appeal to the Third Circuit (pp. 12a-14a of the Slip Opinion of the Third Circuit appended hereto).

The Third Circuit Opinion, however, held that plaintiffs have not made out a claim that their property was "taken" without just compensation. The Third Circuit, although acknowledging that the case of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 107 S.Ct. 2378 (1987) extended the doctrine of taking without just compensation to encompass actions seeking damages for a temporary taking, the Third Circuit denied plaintiffs the right to proceed on this theory.

Federal jurisdiction in the Court of first instance was based upon a claim arising under 42 U.S.C. §1983 and the Fifth and Fourteenth Amendments of the United States Constitution with the amount in controversy exceeding \$10,000, exclusive of interest and costs.

**Argument Setting Forth the Reasons Relied
on for the Allowance of this Writ**

The United States Court of Appeals for the Third Circuit has decided a federal constitutional question in a way in conflict with the applicable decisions of this Court and in conflict with decisions of the Fifth and Eleventh Circuit Courts of Appeal.

The questions presented for review are important questions of federal constitutional law as to what degree of protection the Fifth Amendment provides property owners from arbitrary governmental regulation. This is a recurring issue in communities across the nation. The Third Circuit, in direct conflict with Supreme Court precedent and decisions of the Fifth and Eleventh Circuit Courts of Appeals, has determined that a temporary taking claim cannot be maintained when building permits are denied for arbitrary reasons. The Third Circuit would limit plaintiffs' remedy to a §1983 due process claim. By reviewing this decision, the Supreme Court could clarify the interrelationship of the Takings Clause and Due Process Clause, and provide some certainty for landowners and land use regulators as to the availability of a temporary takings claim as a remedy for arbitrary abridgement of property rights.

The Third Circuit did uphold plaintiffs' due process claim. The Court stated:

The plaintiffs in this case presented evidence from which a fact finder could reasonably conclude that certain council members, acting in their capacity as officers of the Municipality improperly interfered with the process by which the Municipality issued building permits, and that they did so for partisan, political or personal reasons unrelated to the merits of the applications for permits. *These actions can have no relationship to any legitimate governmental*

objective and if proven, are sufficient to establish a substantive due process violation actionable under §1983 (Slip Opinion of the Third Circuit appended hereto, p. 11a, emphasis added).

The Third Circuit's analysis of the substantive due process claim is correct, but wholly inconsistent with its holding at page 14a of the Slip Opinion attached hereto wherein the Court stated:

It is clear that the plaintiff *cannot* make out a claim that their property was "taken" without just compensation.

Such a conclusion, after already deciding that plaintiffs' evidence would support a finding that denial of the permits was an action having no relationship to any legitimate governmental objective, is directly contrary to Supreme Court precedent. The Supreme Court has established that a taking occurs where a zoning ordinance fails to "substantially advance legitimate state interests". *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). This basis for a takings claim is separate and distinct from the more common situation where property is denied all economically viable use. It derives from substantive due process concepts. However, the Supreme Court now recognizes that the abridgement of property rights through improper governmental regulation is more than a substantive due process violation. It is also a taking of those property interests.

Prior to *Agins*, the same rule of law was stated in *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978) where the Court stated that a use restriction may constitute a taking if not reasonably necessary to the effectuation of a substantial public purpose. *Id.* at 127. Both *Agins* and *Penn Central* recognize that a taking on this basis derives from earlier

substantive due process cases such as *Nectow v. Cambridge*, 277 U.S. 183 (1928). *Nectow* was a substantive due process case where a zoning regulation was invalid as applied to the plaintiff because it failed to bear a substantial relation to the public health, safety, morals or general welfare. *Nectow*, 277 U.S. at 188. *Penn Central* also cited *Moore v. East Cleveland*, 431 U.S. 494, 513-14 (1977), where Justice Stevens contended in concurrence that the due process clause and takings clause have been fused into a single standard where a zoning ordinance is unconstitutional if clearly arbitrary and unreasonable, having no substantial relation to public health, safety or welfare.

The Supreme Court has recently provided much greater insight into when a taking occurs as a result of a regulation's failure to substantially advance legitimate governmental objections. In *Nollan v. California Coastal Commission*, 483 U.S. _____, 97 L.Ed. 2d 677 (1987), the Court applied the *Agins* test. The Court stated:

We have long recognized that land use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land." *Nollan*, 97 L.Ed.2d at 687, citing *Agins* and *Penn Central* (emphasis added).

The Court explained that abridgement of property rights through the police power requires that the regulations *substantially* advance legitimate state interests, and that this is a higher level of scrutiny than the rational basis standard applied to due process and equal protection claims. *Id.* at 688 n.3 and 692; see also *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1280 (9th Cir. 1987). Accordingly, in the instant case, a takings claim is even more clearly indicated than the substantive due process claim which the Third Circuit allowed to proceed.

Nollan, supra, clearly establishes that where property rights are diminished by regulation, the regulation must substantially advance legitimate interests. The denial of building permits in the instant case clearly diminished plaintiffs' property rights. By failing to substantially advance legitimate interests, such regulation is converted from legitimate land use regulation into a taking. *Nollan*, 97 L.Ed. 2d at 689. In *Nollan*, the permit condition for public access was unrelated to the government objectives offered by the Coast Commission as a reason to otherwise deny the permit. Therefore, the purpose for the condition was not a "legitimate state interest" but was an out-and-out plan of extortion, and not an exercise of the regulatory power over land use. Similarly, in the instant case, the denial of permits was not to achieve any legitimate interests in regulating land use but, according to evidence put forth by plaintiffs, was motivated by partisan, political or personal reasons unrelated to the merits of the application for the permits.

This argument is afforded even further support by Justice Scalia's dissent in *Pennell v. San Jose*, 99 L.Ed. 2d 1 (1988). Although the majority did not reach the takings claim, Justice Scalia addressed the merits. Scalia characterized the takings challenge as based on the first prong of the *Agins* test and stressed that the second prong, which focuses on the economic impact of the regulation, is irrelevant to whether the regulation fails to substantially advance state interests.

As we said in *Agins*, a zoning law "effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." The *present challenge is of the former sort*. Appellants contend that providing financial assistance to impecunious renters is *not a state interest that can legitimately*

be furthered by regulating the use of property. Knowing the nature and character of the particular property in question, or the degree of its economic impairment will in no way assist this inquiry. Such factors are as irrelevant to the present claim as we have said they are to a claim that a law effects a taking by authorizing a permanent physical invasion of property." *Pennell*, at 99 L. Ed. 2d at 18-19. (Scalia J. dissenting) (Citations omitted; emphasis added).

The error by the Third Circuit Court of Appeals in the instant case was that it considered only whether a taking occurred by denial of all economically viable use. However, the clear precedent in *Agins*, *Penn Central* and *Nollan* indicates that regulations can effect a taking even where various alternative uses remain. In *Nollan*, the property could continue to be used as it had been. Indeed, the California Court of Appeals, much like the Third Circuit in the instant case, rationalized that no taking occurred because remaining economically viable uses were available. *Nollan v. California Coastal Commission*, 177 Cal. App. 3d 719, 723, 223 Cal Rptr. 28 (1986). These uses, however, were irrelevant to the Supreme Court's review of the takings claim based on the failure of the regulation to substantially advance legitimate state interests. *See also Seawall Associates v. City of New York*, 523 N.Y.S.2d 353, 365 (Sup. 1987) (trial court decision recognizing that a taking was found in *Nollan* even though economically viable uses remained). Similarly, in *Pennell* the continued rental of the properties was an economically viable use which was irrelevant to the takings claim based on the first prong of *Agins*.

The record clearly indicates that in the instant case, the plaintiffs did not even have an alternative use available to them. The R-4 zoning was for townhouse

development, the one lot subdivision permitted only the development of townhouses as condominium units and the site plan approval permitted only townhouse development. The land had already been cleared for such use with roads and sewers installed, and no part of it could have been developed or sold for any use in the absence of the issuance of building permits for the approved use.

In addition to being in direct conflict with the above United States Supreme Court decisions, the instant case also directs conflicts with a decision of the Fifth and Eleventh Circuits. In *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981), a developer had obtained a permit to construct an apartment complex in Pleasant Grove. The news of the construction caused an uproar and a referendum was held which showed overwhelming resistance to the complex. In response, the city enacted an ordinance forbidding construction of new apartments and prohibited the developer from proceeding. The Court of Appeals affirmed the District Court's determination that the ordinance was arbitrary and capricious and bore no substantial relation to legitimate concerns. *Id.* at 100. Accordingly, the regulatory action was confiscatory in nature and therefore a taking. *Id.* Clearly, the property could have been put to some other economically viable use, such as single family residences; however, this was irrelevant to the claim that the city's action was arbitrary and irrational.

The same case was before the Eleventh Circuit in 1987. There the Court recognized that the Fifth Circuit had already settled the issue that the city's action constituted a taking. *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 270 (11th Cir. 1987). The remaining issue was the calculation of compensation. The Court

recognized that *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, *supra*, required compensation in this case for the temporary taking. *Id.*

The instant decision of the Third Circuit Court of Appeals conflicts with *Wheeler* because it decides as a matter of law that the arbitrary denial of permits cannot constitute a taking. In contrast, *Wheeler* finds a temporary taking resulting from arbitrary prohibition of building even though other uses of the property remained.

In summary, the *Agins*, *Penn Central*, *Nollan*, *Pennell* (Scalia, J. dissenting) and *Wheeler* decisions all directly conflict with the conclusion in this case that a taking cannot occur as a result of governmental land use actions which are allegedly arbitrary and fail to substantially advance legitimate state interests. These decisions all demonstrate the opposite rule of law.

The Third Circuit decision in this case is further inconsistent with Supreme Court precedent in its determination that arbitrary denial of building permits is "a normal delay" which is not compensable as a temporary taking under *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*. The Third Circuit apparently limits temporary takings to only such takings that result because of a denial of all use of the property.

Although the Supreme Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* . . . extended this doctrine to encompass actions seeking damages for a temporary taking, the Court held that a temporary taking is not different in kind from a permanent taking when the temporary taking denies *all* use of his property.

The Court noted it was not addressing the "quite different questions that would arise in the cause of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like. . . ." (Slip Opinion appended hereto at p. 14a, citations omitted, emphasis in original).

The decision of the Third Circuit in the instant case is further incorrect in ruling that temporary takings can occur only when the property has been denied *all use*. Such a constitutional ruling is in direct conflict with the taking argument discussed above. Furthermore, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, *supra*, the significance of the allegation that all use was denied was only to show that a takings claim was properly alleged. The issue before the Court, however, was not whether a taking had occurred, but was whether compensation was the appropriate remedy, assuming the regulation did effect a taking. Recognizing that a regulation could be amended or repealed, the Court held that compensation was nevertheless required for the temporary taking that occurs from the time the offending regulation is enacted until it is amended or repealed. *First Church*, 96 L.Ed. 2d at 267-68.

This Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, *supra*, indicates that compensation is a constitutional obligation in the event of a taking without distinction between physical invasion taking, taking by undue interference with reasonable investment backed expectations, taking resulting from regulation which fails to substantially advance legitimate objectives, or taking where all use is denied. Although *First Church* was a case in which the taking was based on an allegation of denial of all use, the constitutional principles requiring compensation

enunciated in *First Church* support requiring compensation for any temporary taking regardless upon which theory the taking is based. So long as the government action results in a taking, permanent or temporary, total or partial, compensation is due under the holding of *First Church*.

The Third Circuit Court of Appeals in the instant case characterizes the denial of building permits as a "normal delay" not compensable under *First Church*. *First Church* provided little guidance as to what are normal delays. Common sense dictates that a normal delay occurs when the agency is processing development applications. The inability to begin development right away is not a temporary taking but appears to be a permissible delay that is an "incident of ownership." *First Church* at 267. However, this is not the type of delay involved in the instant case. Here the delay was the result of the arbitrary decision to deny the permits. Such is an extraordinary delay which began when the permits were wrongfully denied and continued for two years until the permits were finally issued by Court Order. This type of governmental action is not an excusable "normal delay" but is a temporary taking because the delay was the result of arbitrary governmental action which failed to advance legitimate objectives.

The Petition for Writ of Certiorari should be allowed for the reason that the Opinion of the Third Circuit Court of Appeals is in conflict with the Courts of Appeals of the Fifth and Eleventh Circuits and in conflict with the applicable decisions of the United States Supreme Court. By reviewing this decision of the Third Circuit, the Supreme Court could clarify the interrelationship of the takings cause and the due process clause and provide some certainty for landowners and land use regulators as to the availability of a temporary takings claim as a remedy for arbitrary abridgement of property rights.

Respectfully submitted,

RICHARD L. ROSENZWEIG, ESQUIRE
475 Two Mellon Bank Center
Pittsburgh, Pennsylvania 15219
(412) 281-6504
Attorney for Petitioners

APPENDIX

**Opinion and Order of the Third
Circuit Court of Appeals**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-3504 and 87-3505

DINO BELLO, an individual
and

SIMMONS PARK PROPERTIES, INC.,
a corporation,

v.

NORMAN L. WALKER, JOHN E. KANON, JAMES M.
MARTIN, JOSEPH J. URBANOWICZ, HARRY E.
BABINGER, JAMES E. HADSELL, YVONNE A.
RIGATTI, GLENN TRAUTMEN, WILLIAM W. RUHL,
WILLIAM G. DODDS, PATRICIA M. PRICE,
CONCETTA SERDY, AND REID W. MCGIBBENY,
individuals

Dino Bello and Simmons Park Properties, Inc.,

Appellants No. 87-3504

DINO BELLO, an individual
and

SIMMONS PARK PROPERTIES, INC.,
a corporation,

v.

MUNICIPALITY OF BETHEL PARK

Dino Bello and Simmons Park Properties, Inc.,

Appellants No. 87-3505

On Appeal from the United States District
Court for the Western District
of Pennsylvania
(D.C. Civil Nos. 80-1264 & 81-346)

Argued December 15, 1987

Before: SLOVITER and COWEN, *Circuit Judges*,
and DEBEVOISE, *District Judge**

(Filed March 1, 1988)

RICHARD L. ROSENZWEIG (ARGUED)
Rosenzweig & Burton
1603 Law and Finance Building
Pittsburgh, PA 15219
Attorney for Appellants

MARVIN A. FEIN (ARGUED)
Baskin Flaherty Elliot & Mannino
29th Floor, One Mellon Bank Center
Pittsburgh, PA 15219
Attorney for Appellees

OPINION OF THE COURT

COWEN, *Circuit Judge*.

These cases arise from a municipality's delay in issuing a building permit. They require us to decide whether a person's constitutional right to due process can be violated when municipal officials process an

* The Honorable Dickinson R. Debevoise, United States District Judge for the District of New Jersey, sitting by designation.

application for a building permit pursuant to a constitutionally adequate procedure, but deliberately and arbitrarily abuse government power to deny the application. We hold that such acts can violate a person's right to substantive due process. One of the cases also presents the issue whether a lengthy delay in obtaining a building permit can result in an unconstitutional taking of property without just compensation. We hold that absent extraordinary circumstances not presented by this case, delays in issuing a building permit do not result in a "taking" of property such that just compensation is constitutionally mandated.¹ We will reverse the district court's grant of summary judgment in favor of defendants as to plaintiffs' due process claims, but will affirm the grant of summary judgment as to the remainder of plaintiffs' claims.

I.

Plaintiff Dino Bello is the principal stockholder of Simmons Park Properties, Inc. ("Simmons Park"), also a plaintiff in this case. In July of 1976, Bello and Simmons Park applied to the municipality of Bethel Park for review and approval of a subdivision plan. The site plan they submitted indicated that the plan had five phases, numbered I through V, each separated by a boundary line.

The plan was eventually approved, and the plaintiffs had no difficulty obtaining building permits for phase I of the project. Forty-seven housing units, comprising phase I, were completed in the spring of 1979. In May of 1979 the plaintiffs applied for building permits allowing them to commence construction of

1. The plaintiffs also claimed that the defendants' actions violated their constitutional right to equal protection and federal antitrust laws. We find these contentions to be without merit and do not address them in this opinion.

the housing units comprising phase V of the project. Norman Walker, Bethel Park's Code Enforcement Officer, denied the plaintiffs' application, ostensibly because the plaintiffs sought to construct phase V of the project before completing phases II-IV. The plaintiffs, however, had never agreed to develop the project in the order suggested by the phases.

On June 8, 1979, Bello and Simmons Park instituted an action in mandamus in the Court of Common Pleas of Allegheny County seeking issuance of the permits and damages, and a peremptory judgment. The case was referred to a referee, who filed a tentative decision denying the motion for a peremptory judgment. On March 26, 1980, the court of common pleas granted peremptory judgment. On January 23, 1981, the court vacated its previous order and adopted the referee's decision. The court then held a hearing on the matter and on May 5, 1981, ordered the municipality to issue the building permits. An appeal from that order was quashed for failure to preserve objections.

On September 3, 1980, the plaintiffs filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the Western District of Pennsylvania against the individual defendants,² and on March 11, 1981, a separate complaint against the Municipality of Bethel Park. Plaintiffs alleged, essentially, that a number of municipal officials improperly influenced the decision to deny them building permits. These

2. The individual defendants, and their official Municipality of Bethel Park positions during the relevant time period are: Norman L. Walker, Code Enforcement Officer; James M. Martin, Municipal Manager; John E. Kanon, Director of Planning; Joseph J. Urbanowicz, Harry E. Babinger, James E. Hadsell, Yvonne A. Rigatti, Glenn Trautmen, William G. Dodds, William W. Ruhl, Concetta Serdy, Reid W. McGibbeny, and Patricia M. Price, members of the Municipal Council.

actions allegedly deprived them of their constitutional rights to due process and equal protection, and violated federal antitrust laws. An amended complaint filed against the individual defendants also alleged that these actions constituted an unconstitutional taking of property without just compensation.

The defendants moved for summary judgment on October 9, 1984, and the motion was referred to a magistrate for a report and recommendation. In support of their motion defendants presented, among other evidence, the affidavit of defendant Walker. Walker stated that he individually made the decision to deny the building permits on the basis that the plaintiffs sought to develop phase V before phases II-IV, and that no other defendant or town official influenced his decision making process.

In opposition to the motion, the plaintiffs presented evidence indicating that certain members of the town council were strongly opposed to multi-unit housing, including their project, and that two members of the council had personal animosity towards one of the plaintiffs' employees, Raymond Kirich. In particular, plaintiffs point to the alleged acts and statements of defendants Yvonne Rigatti, whom Kirich had opposed in a municipal election, and Joseph Urbanowicz. According to the affidavits of Kirich and Bello, various defendant members of the council admitted in conversations that Rigatti and Urbanowicz had pressured them to hinder plaintiffs' development as long as Simmons Park employed Kirich. Bello's affidavit states that he discussed the matter of the permits with members of the council who told him that they spoke to defendant Walker regarding the issuance of the building permits.

The magistrate filed her report and recommendation on April 28, 1987, and recommended that the district court grant defendants' motion for

summary judgment. After the plaintiffs filed objections to the report and recommendation, and the defendants responded to those objections, the district court granted the defendants' motion by order dated June 4, 1987.

The plaintiffs subsequently filed a motion to vacate the district court's order. They argued that in light of the Supreme Court's then recent decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 107 S.Ct. 2378 (1987), the district court improperly dismissed their claim that their property was taken without just compensation. The plaintiffs' motion to vacate was denied by order dated July 22, 1987. The plaintiffs have filed a notice of appeal which specifies that they appeal from the district court's order of June 4, 1987.

II.

Our review of a district court's grant of summary judgment is plenary. *Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp.*, 812 F.2d 141, 142 (3d Cir. 1987).

III.

The first issue presented by this case is whether the district court properly dismissed plaintiffs' constitutional due process claims by way of summary judgment. Plaintiffs assert that the defendants' actions violated their fourteenth amendment right to both procedural and substantive due process. We will consider each of these contentions separately.

A.

Plaintiffs argue that Bethel Park's delay in issuing them a building permit was a denial of property without predeprivation due process. *See Stana v. School Dist. of Pittsburgh*, 775 F.2d 122, 127-29 (3d

Cir. 1985). However, the determination whether to issue a building permit is an administrative decision, and it was the plaintiffs' decision to invoke that governmental mechanism by applying for the permit. This case does not involve a pre-deprivation denial of property, but rather a decision to deny a building permit. Nevertheless, the procedure at issue must comport with constitutional due process.

The issue presented by this case is similar to that presented in *Rogin v. Bensalem Twp.*, 616 F.2d 680 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981). In *Rogin*, the plaintiff argued that a Pennsylvania municipality's administrative land use decision violated his right to procedural due process. We held that the plaintiff had failed to set forth a procedural due process claim where he "set forth [no] behavioral or structural allegations from which we can infer that [the] process was unconstitutional." *Id.* at 694. We noted that Pennsylvania's procedures for challenging zoning ordinances substantially conformed with the due process guidelines enunciated by the Supreme Court. *Id.* at 695.

Here, as in *Rogin*, Pennsylvania affords a full judicial mechanism with which to challenge the administrative decision to deny an application for a building permit. Indeed, the plaintiffs utilized that mechanism and obtained a building permit. While the Pennsylvania courts have ruled that the initial decision to deny the permit was wrong, the plaintiffs have not and cannot show that the decision was made pursuant to a constitutionally defective procedure.

It is the law in this Circuit that a state provides adequate due process when it provides "'reasonable remedies to rectify a legal error by a local administrative body.'" *Cohen v. City of Philadelphia*, 736 F.2d 81, 86 (3d Cir.), *cert. denied*, 469 U.S. 1019 (1984)(quoting *Creative Environments, Inc. v.*

Estabrook, 680 F.2d 822, 832 n.9 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982)). Pennsylvania clearly provides such remedies, as this case exemplifies,³ and therefore plaintiffs' have no justifiable due process claim.

B.

The plaintiffs' substantive due process claim has greater merit. Recent decisions of the Supreme Court and this Circuit have diminished the scope of the right to substantive due process. *See Rogin*, 616 F.2d at 689. Nevertheless, actions alleging violations of the right to substantive due process remain viable in certain circumstances, and we feel that such allegations are present in this case. We will reverse the district court's grant of summary judgment on this claim.

The Supreme Court has discussed the scope of the substantive due process right in a number of recent cases. In *Daniels v. Williams*, 474 U.S. 327 (1986), the Court, in holding that the due process clause was not implicated by a state's negligent deprivation of life, liberty or property, pointed out that the guarantee of due process has historically been applied to deliberate decisions of government officials. *Id.* at 331. The Court noted that the clause was ""intended to secure the individual from the arbitrary exercise of the powers of government,"" *id.* (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)(quoting *Bank of Columbia v. Okely*, 4 Wheat. (17 U.S.) 235, 244 (1819))), and

3. The plaintiffs' claim, to the extent it argues that delays in Pennsylvania's judicial process denied them procedural due process, points to alleged procedural defects which cannot be attributed to these defendants. Moreover, state judicial delay in a civil case must be more egregious than the delay in this case to constitute a denial of procedural due process.

distinguished the *Daniels* case from cases involving an abuse of power.

In the related case of *Davidson v. Cannon*, 474 U.S. 344 (1986), the Court held that mere negligence on the part of a state does not amount to an abuse of state power such that constitutional due process is implicated. Justice Blackmun, dissenting, noted that he agreed with the majority's conclusion that a "deprivation must contain some element of abuse of governmental power, for the 'touchstone of due process is protection of the individual against arbitrary action of the government.'" *Id.* at 353 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). See also *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263 (1977) (constitutional due process right to be free of arbitrary or irrational zoning action); *Pace Resources, Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1034-35 (3d Cir.), *cert. denied*, 107 S.Ct. 2482 (1987) (to demonstrate violation of right to substantive due process, plaintiff must show that land use regulation was arbitrary or irrational). These cases reveal that the deliberate and arbitrary abuse of government power violates an individual's right to substantive due process.

This analysis is consistent with the Fourth Circuit's decision in *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983). In *Scott*, the plaintiff claimed that a town council improperly intervened in the municipality's decision whether to issue him a building permit. The Fourth Circuit held that because Scott was entitled to the building permit under South Carolina law, and had presented evidence that the council's interference was motivated by a lack of impartiality towards him, he had stated a claim that the municipality's action violated his right to substantive due process. *Id.* at 1417-21.

In this case, the district court distinguished *Scott*, and read our decisions in *Rogin* and *Cohen* as approving the approach adopted by the First Circuit in *Chiplin Enterprises v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983). In *Chiplin*, which also involved the denial of a building permit, the First Circuit held that "[t]he claim that denial of a permit was improperly motivated, unsupported by an allegation of the deprivation of a specific constitutional right, simply raises a matter of local concern, properly and fully reviewable in the state courts." *Id.* at 1527. The court stated that a "mere bad faith refusal to follow state law in such local administrative matters simply does not amount to a deprivation of due process where the state courts are available to correct the error." *Id.* at 1528.

Since *Rogin* and *Cohen*, we have addressed these issues in *Pace Resources Inc. v. Shrewsbury Twp.*, 808 F.2d 1023 (3d Cir.), *cert. denied*, 107 S.Ct. 2482 (1987). In that case we were faced with a claim that a municipality's zoning regulation violated the plaintiff's right to substantive due process. We held that in such cases the plaintiff bears the burden of demonstrating that the regulation is arbitrary or irrational. *Id.* at 1035. We found it significant that the municipality could have had rational reasons for the regulation, and concluded:

Because it appears that on the face of the amended complaint that the Township decisionmakers could have had rational reasons for the decisions contested here and because that complaint alleges no facts suggesting arbitrariness, it fails to state a substantive due process claim upon which relief can be granted.

Id. at 1036. We noted, however, that the plaintiff in *Pace* did "not present a case involving actions aimed at

this developer for reasons unrelated to land use planning." *Id.* at 1035.

We need not define, at this juncture, the outer limits of the showing necessary to demonstrate that a governmental action was arbitrary, irrational, or tainted by improper motive. The plaintiffs in this case presented evidence from which a fact finder could reasonably conclude that certain council members, acting in their capacity as officers of the municipality improperly interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permits.⁴ These actions can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation actionable under section 1983. While the defendants claim that the building permit was denied because of plaintiffs' failure to build in numerical sequence, thus presenting an arguably rational ground for the denial of the permit, it is the factfinders' role to resolve this factual dispute. We will reverse the district court's grant of summary judgment on this claim.

4. The defendants also argue that the plaintiffs cannot make out a section 1983 claim against the municipality because they allege merely a single act -- the withholding of a building permit -- and thus cannot establish that the defendants acted pursuant to a municipal policy. See *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). However, the Supreme Court's position in *Tuttle* was clarified by *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). *Pembaur* noted that a single decision can constitute a "policy" where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* at 483-84. As plaintiffs allege that such a deliberate choice occurred in this case, we reject the defendants' municipal policy argument.

IV.

We must also address whether the district court properly dismissed the plaintiffs' claim that the delay in issuing the building permit constituted an unconstitutional taking of property without just compensation.

A.

As a preliminary matter, we must determine whether this issue is properly before us for review. Defendants argue that because the complaint filed against Bethel Park did not assert the claim that their property was unconstitutionally taken without just compensation, the plaintiffs can not raise this issue on appeal against the municipality. The defendants also assert that plaintiffs' counsel waived this issue against the individual defendants when he stated in a brief to the district court:

Plaintiffs have not asserted a claim under the Just Compensation clause and do not assert that their property was taken from them by inverse condemnation.... There are no elements of a taking which would justify an eminent domain proceeding. No government entity took possession of the land. Neither in this case could Plaintiffs argue that there was any restrictive zoning laws or development regulations.

App. at 360-61.

Finally, defendants argue that plaintiffs waived this argument by filing a defective notice of appeal. They point out that this argument was only presented to the district court in the context of the plaintiffs' motion to vacate the district court's order of June 4, 1987, and that since the notice of appeal filed by the plaintiff refers only to that order, the plaintiffs have not

appealed the district court's order of July 22, 1987, denying their motion to vacate.

The plaintiffs concede in their brief to this Court that they did not plead this claim against the defendant municipality of Bethel Park, and we will thus not consider the claim against that defendant. The plaintiffs, however, insist that their unconstitutional taking claim against the individual defendants is properly before us. We agree.

Plaintiffs raised this issue in their complaint against the individual defendants, and the district judge considered the merits of this claim in the context of the plaintiffs' motion to vacate the district court's order granting summary judgment. Although the plaintiffs, in a brief to the district court stated that they had not raised such a claim, they now admit that "in drafting such brief [we] erroneously overlooked the Amended Complaint ... which does plead such a claim." Appellants' Brief at 18. It is also significant that the brief at issue was filed prior to the Supreme Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 107 S.Ct. 2378 (1987), which expanded the ability of property owners to assert claims that their fifth amendment right to not have property taken without just compensation has been violated. We conclude that the plaintiffs did not waive this claim against the individual defendants.

We also find that the plaintiffs' notice of appeal was not defective. There is a "policy of liberal construction of notices of appeal ... in situations where the intent to appeal an unmentioned or mislabeled ruling is apparent and there is no prejudice to the adverse party." *Gooding v. Warner-Lambert Co.*, 744 F.2d 354, 357 n.4 (1984)(quoting parenthetically *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d

1049, 1056 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981)). In addition, an appeal of a grant of summary judgment invokes this Court's jurisdiction over the disposition of all claims in a complaint. *Murray v. Commercial Union Ins. Co. (Commercial)*, 782 F.2d 432, 434-35 (3d Cir. 1986). We thus conclude that the district judge's orders of June 4, 1987 and July 22, 1987 are both properly before us.

B.

Turning to the merits of the plaintiffs' unconstitutional taking claim, it is clear that the plaintiffs have not and cannot make out a claim that their property was "taken" without just compensation. Although the Supreme Court in *First Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 107 S.Ct. 2378 (1987), extended this doctrine to encompass actions seeking damages for a temporary taking, the Court held that a temporary taking is not different in kind from a permanent taking when the temporary taking denies a landowner *all use* of his property. *Id.* at 2388. The Court noted that it was not addressing the "quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" *Id.* at 2389.

As the plaintiffs here were merely denied a particular building permit, and retained the right to put their land to a variety of alternative uses, the actions of the defendants can not be said to have denied them all use of their property. Indeed, they have made no such allegation. We will affirm the district court's orders granting the defendants summary judgment on this claim, and denying the plaintiffs' motion to vacate the court's order of summary judgment.

V.

We will reverse the district court's order granting the defendants summary judgment on plaintiffs' claim that they were denied their constitutional right to substantive due process, and will affirm the district court's dismissal of the remainder of the plaintiffs' claims. Each party to bear its own costs.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit*

**Memorandum Order of the United States District
Court for the Western District of Pennsylvania,
Dated June 4, 1987**

**IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania**

Civil Action No. 80-1264.

DINO BELLO, an individual, and SIMMONS PARK
PROPERTIES, INC., a corporation,
Plaintiffs,

v.

NORMAN L. WALKER, JOHN E. KANON, JAMES
M. MARTIN, JOSEPH J. URBANOWICZ, HARRY
E. BABINGER, JAMES E. HADSELL, YVONNE A.
RIGATTI, GLENN TRAUTMAN, WILLIAM M.
RUHL, WILLIAM G. DODDS, PATRICIA M.
PRICE, CONCETTA SERDY, and REID W.
McGIBBENY, individuals,
Defendants.

Civil Action No. 81-346.

DINO BELLO, an individual, and SIMMONS PARK
PROPERTIES, INC., a corporation,
Plaintiffs,

v.

MUNICIPALITY OF BETHEL PARK,
Defendant.

MEMORANDUM ORDER

AND NOW, this 4th day of June, 1987, the magistrate having filed a report and recommendation suggesting that defendants' motion for summary judgment be granted, the plaintiffs having filed objections to that report, the defendants having responded to the objections, and the court having given the matter due consideration, IT IS ORDERED that defendants' motion for summary judgment be, and the same hereby is, granted for the following reasons.

1) We have reviewed the plaintiffs' objections to the magistrate's report and believe that the plaintiffs merely reiterate arguments presented to, and properly rejected by, the magistrate. In particular, we believe that *Cohen v. City of Philadelphia*, 736 F.2d 81 (3d Cir. 1984), governs this case and, therefore, is dispositive of the plaintiffs' due process claim. Consequently, plaintiffs' reliance upon cases from other Circuits is misplaced.

2) In addition to the reasons given by the magistrate, we believe that the evidence does not establish the requisite intent for a due process claim. The uncontradicted evidence establishes that Walker denied issuance of the building permit based upon misinterpretation of the site plan. At best, Walker's actions constitute a negligent act, and therefore, do not amount to a deprivation of property cognizable under §1983. See *Daniels v. Williams*, 474 U.S. _____, 88 L.Ed.2d 662 (1986) and *Davidson v. Cannon*, 474 U.S. _____, 88 L.Ed.2d 677 (1986).

3) We find no merit in plaintiffs' challenges to the magistrate's analysis of the equal protection claim.

4) Accordingly, for the reasons given in the report and recommendation of the magistrate along with the reasons given herein, we will grant the defendants' motion for summary judgment.

(Illegible) DIAMOND
United States District Judge

cc: Hon. Ila Jeanne Sensenich
Chief U.S. Magistrate

Richard L. Rosenzweig, Esq.
Rosenzweig & Burton
1603 Law & Finance Building
Pittsburgh, Pa. 15219

Marvin A. Fein, Esq.
Richard H. Martin, Esq.
Baskin, Flaherty, Elliott & Mannino
2900 One Mellon Bank Center
Pittsburgh, Pa. 15219

Anthony J. Martin, Esq.
Monroe Complex, Building I
Monroeville, Pa. 15146

19a

**Memorandum Order of the United States District
Court for the Western District of Pennsylvania,
Dated July 22, 1987**

**IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania**

Civil Action No. 80-1264.

DINO BELLO, an individual and SIMMONS PARK
PROPERTY, INC., a corporation,
Plaintiffs,

v.

NORMAN L. WALKER, *et al.*,
Defendants.

Civil Action No. 81-346.

DINO BELLO, an individual and SIMMONS PARK
PROPERTY, INC., a corporation,
Plaintiffs,

v.

MUNICIPALITY OF BETHEL PARK,
Defendant.

MEMORANDUM ORDER

AND NOW, this 22nd day of July, 1987, the plaintiffs
having filed a motion to vacate the order of summary
judgment in light of the recent Supreme Court case of

First English Evangelical Lutheran Church of Glendale, California v. Los Angeles County, 55 U.S.L.W. 478 (June 9, 1987), the defendants having responded to said motion, and the court having given the matter due consideration, IT IS ORDERED that plaintiffs' motion be, and the same hereby is, denied for the reasons that *First English Evangelical Lutheran Church* is wholly inapposite to the case at bar and therefore, does not offer any basis for vacating our previous order.

(Illegible) DIAMOND
United States District Judge

cc: Richard L. Rosenzweig, Esq.
1603 Law & Finance Building
Pittsburgh, Pa. 15219

Marvin A. Fein, Esq.
Baskin, Flaherty, Elliot & Mannino
One Mellon Bank Center
500 Grant Street, 29th Floor
Pittsburgh, Pa. 15219

